1974

Some Effects of Extending the Navigation Season on the Great Lakes: A Need for Congressional Action

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LOCATED IN THE ST. MARY'S RIVER, which links Lakes Superior and Huron, is a group of inhabited islands whose residents could conceivably be cut off from the rest of the world during the winter months. For generations, residents have travelled back and forth between their island homes and the mainland to work, shop, obtain fuel, attend school and religious services, and receive medical treatment. When conditions permitted, the trips were made by private boat or public ferry vessel over the two hundred to one thousand yards which separate the various islands from the mainland. Between mid-December and April of each year, however, the water separating the two shores is frozen, and the islanders must transit over or through an "ice highway" to the mainland in order to carry on their daily activities. Over the years this has been accomplished either by walking over naturally-formed ice bridges or by using the public ferry which continues to operate in an open-water track between those ice bridges.[1]

Recently a situation has developed which threatens to strand these people on their islands. This result stems from the premature and unnatural breakup of the surrounding ice cover used by the islanders to transit to and from the mainland. The cause of this premature ice breakup is a pilot program undertaken by the United States Army Corps of Engineers in conjunction with the United States Coast Guard and other federal agencies, pursuant to an act of Congress, authorizing an extension of the navigation season on the Great Lakes.[2]

The ultimate result of this ongoing pilot program has been the loss by the islanders of their natural right to move over natural things. This situation typifies similar problems facing many property owners along potentially frozen waterways, and illustrates the general problem facing the entire Great Lakes region with the advent of a permanently extended winter shipping season.

The thrust of this note is to probe that "natural right" as affected by the extended navigation season proposal. The basic conflict is one of competing rights and interests. On the one hand is a

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[1] JOINT UNITED STATES COAST GUARD — CANADIAN COAST GUARD GUIDE TO GREAT LAKES ICE NAVIGATION 16 (Spring 1973) (Copy on file at United States Coast Guard Ice Navigation Center, Fed. Bldg., Cleveland, Ohio) [hereinafter cited as JOINT GUIDE].

[2] River and Harbor Act of 1970, Pub. L. No. 91-611, § 107, 84 Stat. 1818, *amending* 33 U.S.C. § 426 (1970).

group of private citizens claiming a private right in the traditional use of the ice in its natural condition. On the other hand are those arguing in favor of the economic desirability of opening a vast, commercially rich region to year-round waterborne accessibility. In other words, there is a clash between conflicting private regional interests, and public national interests. It is the author's contention that since Congress gave birth to the problem by legislating federal resource involvement into an otherwise private commercial realm, any remedies which exist as a result of adverse effects on private rights must likewise originate with Congress and may not properly be sought through the courts. Of particular importance to such a conclusion, and the liabilities of the various parties involved, is a full appreciation of the source of the problem, an understanding of the development of the private right to travel on ice, the development of the public right of navigation, and the role of the federal government in breaking ice.

Source of the Problem

For many years the United States has been faced with a problem regarding the utilization of one of its great national resources, the Great Lakes region.[3] This vast network of rivers, straits, canals, and lakes affords both the United States and Canada a means of reaching an immense segment of industrial and agricultural resources which would otherwise be accessible only over land or by air.[4] The fact that the industry of this region contributes over thirty-four percent of the gross national product of the United States and Canada certainly indicates its importance as a very fruitful economic resource.[5] Until recently, however, the majority of the Great Lakes ports have been icebound, and therefore inaccessible, for as much as four and one-half months of the year, or nearly thirty-eight percent of the time.[6] It was not until 1965 that active efforts were initiated on the federal level to study the feasibility of extending the navigation season on the Great Lakes and St. Lawrence Sea-

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[3] Volpe, *Extension of the Seaway Navigation Season Is Essential to Halt Economic Erosion,* SEAWAY REVIEW (Summer, 1971) (Reprinted in 117 CONG. REC. 40320, 40322 (1971).

[4] R. REEBIE AND ASSOCIATES, INC., LAND TRANSPORTATION ECONOMICS FOR GREAT LAKES TRAFFIC VOLUME (1971). The economic advantages of water transportation through the Great Lakes system were made available to a vast market consisting of 36% of the total U. S. population, 42% of the nation's industrial activity, 50% of its agricultural output, and 50% of its steel production. Bulk commodities alone contribute the major domestic traffic on the Lakes, with 77% of the nation's iron ore needs, 76% of its coal needs, and 66% of the nation's limestone needs moving on this Great Lakes system. Letter from W. R. Ransom, General Manager, Lake Shipping Operation, United States Steel Corp., to R. T. Keenen, Esq., Ray, Robinson, Keenen and Hanninen, November 13, 1973.

[5] *Extension of Navigation Season on the Great Lakes,* 117 CONG. REC. 5069 (1971) (remarks of Senator Griffin).

[6] *Id.*

way with a view toward expanding the shipping efforts in that region to a full-time, year-round basis.[7] The ultimate goal, of course, was to gain the maximum benefit of the economic productivity of the area, which up until then had not been fully tapped.[8]

In response to these goals, Congress legislated the requirement for a pilot program to determine the feasibility of extending the navigation season into the winter months.[9] However, just as a familiar axiom of physics holds that for every action there is an equal and opposite reaction, apparently the government's positive action in extending the shipping season has triggered an analogous negative reaction. As a result, a conflict has developed between a minority group of islanders who depend on nature for their mobility and thus their very existence, and the interests of the national economy as a whole in developing trade potential in the region. Of special significance are the legal ramifications which pit individual rights against regional and national economic needs. The position that the government and the courts have taken and will take on this issue is thus an important policy question.[10]

The primary force behind the pilot program has been Congressional authorization of six and one-half million dollars to enable the United States Army Corps of Engineers and the United States Coast Guard to study the various problems affecting an extended season endeavor. One of the matters in dispute is the problem of icebreaking, its various environmental effects, and its potential legal ramifications.[11]

More specifically, the problem has surfaced in the St. Mary's River area connecting Lake Superior and Lake Huron, although any discussion here of that locale must necessarily relate to similar problems experienced elsewhere in the Great Lakes system.[12] Traditionally, during the period from mid-December through April, natural ice bridges form between the several inhabited islands located in the St. Mary's River between Sault Ste. Marie and Pt. DeTour.[13] During

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[7] River and Harbor Act of 1965, Pub. L. No. 89-298, § 304, 79 Stat. 1093.

[8] The 1965 study was authorized by Congress to investigate and determine the preliminary engineering and economic feasibility of extending the navigation season. The report of that first study emphasized the complexity of the project and recommended a second study.

[9] River and Harbor Act of 1970, Pub. L. No. 91-611, § 107, 84 Stat. 181; *Great Lakes Shipping Crisis,* 117 CONG. REC. 40320 (1971) (remarks of Senator Griffin).

[10] *Year-Around Shipping Season on the Great Lakes,* 117 CONG. REC. 14945 (1971) (remarks of Representative Ruppe).

[11] Although the propriety or legality of Coast Guard icebreaking operations has not before been challenged, the integral part such activities must take in the current project necessitates consideration of those factors at this time; *see, Year-Around Shipping Season on the Great Lakes, supra* note 10.

[12] JOINT GUIDE, *supra* note 1.

[13] For a nostalgic discussion of the reliance on the natural conditions discussed herein, see Lowe, *The Ice Bridge,* The Weekly Wave (Feb. 24, 1971) (Copy on file at United States Coast Guard Ice Navigation Center, Fed. Bldg., Cleveland, Ohio).

the winter months, transit to the mainland by the island residents is accomplished by travel on foot, sled, snowmobile, or other available devices over the ice, or by means of ferry vessels operating on routine schedules between the larger islands and the mainland.[14] As a ferry transits the area between an island and its mainland docks, an open-water track forms as the water freezes on the upstream and downstream sides of the passage. The water current through this track helps prevent the open water from freezing over. Thus, naturally-formed ice bridges (or "booms," as they may sometimes be called) above the ferry track have been relied on in the past as an aid in maintaining a clear ferry path. Where no vessel service is available, the ice has been used as a natural bridge between the island and the mainland.

With the introduction of an extended navigation season, many of these traditional ice bridges have been destroyed or dislocated, with the result that the islanders no longer can depend on natural conditions for the formation of these bridges. Now, instead, the bridge formation is being forestalled, disrupted, and often prevented by the continuation of vessel traffic through these areas long after the time such traffic otherwise would have been excluded because of the frozen conditions normally prevailing after mid-December. But for the government-sponsored feasibility program and assistance rendered by a small armada of Coast Guard icebreakers, most vessel traffic through these areas would be curtailed or eliminated as in the past.[15] It is this continuing vessel traffic which dislodges the forming ice booms and causes the broken brash ice to flow into the open track area where it becomes jammed and eventually prevents the ferry vessel's operation.[16] The natural ice bridges formed between the smaller islands and the mainland also become dislodged, thereby

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[14] Spring breakup, or even thaw breakups, will not be considered here.

> One of the worst floods the Soo [Sault St. Marie, Mich.] area has had came in 1951 prior to the extended season when during a thaw, ice broke loose from the Soo Harbor and jammed into the Little Rapids Cut area. This naturally stopped any transit to the island along with flooding the area, and the Neebish islanders have always had a problem in establishing their ice bridge in the fall and also with the spring break up. Both of these times of year are hazardous and certainly this type of archaic transit should not be encouraged.

Letter from W. R. Ransom to R. T. Keenen, *supra* note 4.

[15] 144 NAT'L GEOGRAPHIC, 148-49 (August 1973); JOINT GUIDE, *supra* note 1, at Encl. (1).

[16] The terms ice boom and ice bridge may be used interchangeably herein. However, ice bridge more nearly refers to the natural formation of ice cover between an island and the mainland over which individuals walk, whereas the term ice boom refers to an ice formation, not necessarily used for walking, upsteam of a ferry vessel track to prevent small, broken pieces of ice flowing into the track. It is really more a natural blockage than anything else. The contention has been made that if steps were taken to protect an ice bridge with artificial booms or by some other means, there would be created in the absence of a permit from the Army Corps of Engineers an unlawful obstruction to navigation. *See* 33 U.S.C. §§ 511-13, 516, 519 (1971).

effectively stranding the residents on these islands without available sources of food, fuel, medical aid, and other necessities.

While the problem of premature breakup is not one of national prominence or general concern at this time, it has aroused the attention of members of the House of Representatives and the Senate, who have voiced strong concern for the safety and well-being of the island inhabitants. The problem is sufficiently important to enough people that it should be resolved before any determination is made regarding final approval of any extended winter navigation program assisted by federal resources.[17]

Development of the Conflict

The legal issues involve the competing rights of commercial shipping (aided by federal government resources) to engage in commerce, and local inhabitants to rely on the naturally frozen conditions of the surrounding waters. The public (commercial or governmental) interest, although possibly economically justifiable, *may* be forced by the private (residential) interest to bear the burden of its seemingly disruptive consequences.

Private Rights to Use Natural Ice Formations

Traditionally, the right to travel on ice has been recognized as a public right.[18] This right has been classified with the right to travel on public highways and navigable waters and is not suspended merely because the area must be traversed by foot rather than by boat.[19] The right to travel on the ice, although not a dominant right exclusive of all others, has been held to be superior to many.[20]

In the past, courts have considered alternative uses of frozen waterways and the ancillary rights attached thereto. For example, using the ice as a roadway during the winter months as a substitute for the traditional ferry vessel crossing during the milder months was considered a right, and any wanton and unnecessary disturbance of that right was held to be improper.[21] The violation of that right to use the ice for transit constituted a breach of "that great principle of social duty, by which each one is required so to use his own rights as not to injure the rights of others."[22] Other courts have

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[17] *Year-Around Shipping Season on the Great Lakes, supra* note 10.

[18] 45 C.J. *Navigable Waters* § 135 (1928); 65 C.J.S. *Navigable Waters* § 59 (1966); Board of Park Comm'rs v. Diamond Ice Co., 130 Iowa 603, 105 N.W. 203 (1905).

[19] Board of Park Comm'rs v. Diamond Ice Co., 130 Iowa 603, 105 N.W. 203 (1905).

[20] French v. Camp, 18 Me. 433, 36 Am. Dec. 728 (1841).

[21] *Id.* at 434-35, 36 Am. Dec. at 729.

[22] *Id.* at 435, 36 Am. Dec. at 729.

likewise dealt with the right of an individual to rely on the waterway in its frozen state for passage,[23] and have even gone so far as to impose criminal sanctions for the unlawful interference and disturbance of the right of public passage across ice in a river that had been used for many years for that purpose.[24]

In another area, the courts have discussed the business of ice harvesting as that activity affects use of the ice by others.[25] It has been held that the right to gather ice might in fact take precedence over the right to travel on the ice, depending on a balancing of the interests to be served and the relation of those interests to the community at large.[26] Also, where ice was used for recreation, another court found that a duty was owed to the public in the exercise of the individual's right of reasonable use of the ice to refrain from making an otherwise safe passage unsafe.[27]

Since the specific requirements of these conflicting rights do not permit simultaneous use and enjoyment of the same ice for their different purposes, the usage offering the greater benefit to the public should logically be favored. That does not mean, however, that one usage should be preferred to the total exclusion or elimination of all others.[28] Rather, since not all rights are equal, their relative importance must be determined in light of the particular circumstances of each case.[29]

Irrespective of the question of balancing of rights, it is apparent that the public has a right to use frozen waters for travel, particularly where a traditional route has been established by continuous and frequent resort. Furthermore, the courts seem to implicitly hold that the longer the exercise of the right and acceptance of it by the public at large, the more significant the right will become relative to other rights which may tend to compete with it. Consequently, the traditional use in the Great Lakes region of naturally formed ice bridges as a mode of transportation for generations

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[23] Maine v. Wilson, 42 Me. 9, 21 (1856), noted two conflicting interests, a public highway across a navigable stream and "an existing highway, the river itself, in which all the citizens have an interest." Thus, the potential conflict between the two modes of utilizing the same waterway for travel began to develop. *See also* Munninghoff v. Wisconsin Conservation Comm'n, 255 Wis. 252, 38 N.W.2d 712, 716 (1949).

[24] Commonwealth v. Christie, 13 Pa. County Ct. 149 (1893).

[25] Woodman v. Pitman, 79 Me. 456, 10 A. 321 (1887). Concededly, such concern has lost much of its relevance with today's reliance on modern refrigeration methods.

[26] Woodman v. Pitman, 79 Me. 456, 10 A. 321 (1887).

[27] Parsons v. E. I. DuPont de Nemours Powder Co., 198 Mich. 409, 414, 164 N.W. 413, 415 (1917); *accord,* Gay v. Webster, 277 Mich. 255, 269 N.W. 164 (1936) *and* Sowles v. Moore, 65 Vt. 322, 26 A. 629 (1893).

[28] Woodman v. Pitman, 79 Me. 456, 461, 10 A. 321, 327-28 (1887).

[29] *Id.* at 459, 10 A. at 324; *accord,* Whitcher v. State, 87 N.H. 405, 181 A. 549 (1935).

must be considered as a substantial right. However, if a greater number of people are affected by the exercise of a different and competing right, even though it is a more recent development, would a court rule in favor of the right operating for the longer period of time? It would seem that some conflicting public endeavor of a more significant nature surely would be needed to overcome the presumption of superiority of a right which appears to have been established with respect to the right to travel on ice. Such may be the case when the paramount right of navigation is considered.

The Public Right of Navigation

That such a public endeavor should be encompassed within the commerce clause of the Constitution should come as no surprise, since it is on the basis of this one section of the Constitution that much of the national economic policy has been sustained.[30]

The congressional power to regulate commerce among the several states and with foreign nations by regulating navigation was judicially treated as early as 1824.[31] Since then, in the area of federal control over navigable waters, a steady progression of cases has supported and gradually extended this basic premise of congressional authority.[32]

The congressional power over commerce insures that navigation on all of the navigable waters of the United States is protected and advanced in as safe and convenient a manner as possible.[33] As to

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[30] U. S. CONST. art. I, § 8,: "The Congress shall have the power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." "Commerce includes navigation." Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 724 (1866). For a survey of the application of the commerce clause of the Constitution by the courts, see W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 139-441 (3d ed. 1970).

[31] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

[32] Pennsylvania v. The Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855) (holding a bridge built across the Ohio River to be an obstruction to navigation, but ultimately acceeding to Congressional power to regulate commerce, including the regulation of navigation, because an act of Congress had declared the bridge to be a lawful structure, not a navigation obstruction); Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 714 (1866), *citing* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (holding that essentially any navigable river situated in more than one state was under the regulation of Congress as part of the public property of the nation. This power includes the responsibility to prevent obstructions of any kind from any source, and to take whatever steps were necessary and proper under the circumstance to prevent recurrence); The Clinton Bridge, 77 U.S. (10 Wall.) 454 (1870) (holding an act of Congress which declared a particular bridge a lawful structure necessary for a post-route constitutional, and reaffirming Congress' power to decide what should be considered an illegal obstruction to navigation); The Daniel Ball, 77 U.S. (10 Wall.) 557, 564 (1871) (noting that Congress is also authorized to regulate the form and size of vessels to be used on navigable waters, and to inspect and license such vessels to insure that they have been properly constructed and equipped). In regard to the inspection and licensing of vessels, *see,* H. KAPLAN & J. HUNT, THIS IS THE COAST GUARD 153-60 (1972). For an excellent abbreviated discussion of the right of navigation in another context, see Grundman, *Swell Damage and the Right of Navigation,* 15 CLEVE.-MAR. L. REV. 92, 95 (1966) and authorities cited therein.

[33] The Daniel Ball, 77 U.S. (10 Wall.) 557, 564 (1871).

what waters might be covered by such authority, the Supreme Court has announced simply that "those rivers are public *navigable* rivers in the *law* which are *navigable* in *fact*."[34] (emphasis added)

The federal power over navigation has included changes in the course of navigable streams. A dispute arose between South Carolina and Georgia when water was diverted from one channel of the Savannah River by construction of a crib dam in order to raise the water level of another channel of the river, thus improving the latter's navigability.[35] In the equity action seeking injunctive relief on the basis that such improvement to one channel was in fact an obstruction of certain methods of navigation in the other, the Court determined that Congress' right to regulate commerce and navigation embodies the right to make improvements to navigable rivers in aid of navigation whether or not some structures constructed for that purpose might actually be obstructions.[36]

Soon after the turn of the century, the power of the United States government to control and regulate navigation in support of commerce was exercised over *waters navigable only by artificial means* even though completely located within the borders of one state. In an action involving the Erie Canal and the Hudson River, it was noted that although a distinction in fact might exist between artificially navigable waters wholly located within one boundary and naturally navigable waters, nevertheless, there is no distinction in principle.[37] Canals, it was said, cannot be distinguished from other navigable bodies of water, because they are normally built to connect otherwise naturally navigable bodies of water or to improve an already partially navigable existing channel between such bodies, and are generally plied by the same vessels as transit other navigable waters.[38] The Court then proceeded to list several such connecting links permitting navigation from the western end of the Great Lakes to the Welland Canal and the St. Lawrence River, including the St. Mary's Canal.[39] The fact that the waterway in question was located completely within the state of New York in that case was held to be immaterial. Since it acted as a key link in the "highway of commerce between ports in different states and foreign countries," it was considered as navigable water within the regulatory scope of Congress

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[34] *Id.* at 563. Navigable in fact is use or able to be used "in their ordinary condition" as highways for commerce in "customary modes of trade and travel on water." *Id.* at 564.

[35] South Carolina v. Georgia, 93 U.S. 4 (1876).

[36] *Id.*

[37] The Robert W. Parsons, 191 U.S. 17, 26-27 (1903).

[38] *Id.* at 27.

[39] *Id.* In Ainsworth v. Munoskong Hunting & Fishing Club, 159 Mich. 61, 123 N.W. 802 (1909), it was noted that the St. Mary's River is, in fact, navigable water.

and under the judicial jurisdiction of the admiralty courts of the United States.[40]

The "public right of navigation" again came into focus in another case involving the St. Mary's River where the ownership of private property in water power capacity of certain rapids and falls located on that river was discussed.[41] That such a property right could exist under private ownership was rejected by the Court. An individual could conceivably "own" a private stream which was located wholly on land belonging to him, the Court said, but it is absolutely inconceivable that there could exist any private ownership or property rights in the "running water in a great navigable stream."[42] Any property rights which may exist in the use of the water, of which one is navigation, therefore, belong in common to the public. It was stated therein, however, that in addition to those common public rights, the riparian owners along such navigable waters also have certain incidental rights of ownership which include the right to build wharves, piers, docks, or other structures in shallow water for access to deeper water. Even that right, however, was held to be subordinate to the public right of navigation, and if such structures were found to be obstructions to navigation or were otherwise detrimental to the public's interest therein, the owner was obliged to suffer the consequences of such determination and was required to remove the structures. It was held that Congress was the sole authority for determining what did or did not constitute an obstruction to navigation.[43]

By 1913 the "plenary power of the United States to legislate for the benefit of navigation" was a foregone conclusion.[44] The Court, therefore, no longer found it difficult to uphold certain public works projects along such waterways as the Mississippi River by finding that navigation was aided thereby. Progress and development would not be halted merely by an individual's assertion of a private right to the retention of "primitive conditions" of his land.[45]

So well recognized was the public right of navigation that the Court thereafter described it as a "servitude."[46] In an action involving the construction of locks and dams on the Cumberland and Ken-

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[40] The Robert W. Parsons, 191 U.S. 17, 28 (1903).

[41] United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913).

[42] *Id.* at 69.

[43] *Id.* at 70.

[44] Jackson v. United States, 230 U.S. 1, 23 (1913).

[45] *Id.* at 20. "Primitive conditions" as used herein refers to the natural, unimproved state of the land.

[46] United States v. Cress, 243 U.S. 316 (1917).

tucky Rivers by the United States government in aid of navigation, the Court found that a "natural servitude to the interests of navigation" exists in riparian lands forming the banks and bed of a stream, but noted that such servitude was restricted to the natural conditions of the waterway.[47]

The "dominant power in respect of navigation" has justified raising the water level in a stream for the improvement of navigation, even where damage to structures located between high and low-water mark resulted.[48] Since the Court noted that repeated application of the federal power over public navigable waters included the entire stream bed below the high-water mark, it refused to recognize any private property rights below such point.[49]

The Supreme Court recognized the "dominant servitude in favor of the United States" in 1954, when it was called upon to determine whether or not the Federal Water Power Act of 1920 abolished private proprietary rights to use waters of navigable streams for power purposes.[50] A clear authorization by some congressional enactment is required before the navigational servitude may be exercised against private rights in the use of navigable waters which may have been granted under state law.[51] As a classic example of the fulfillment of such requirement, the Court cited *United States v. Chandler-Dunbar Water Power Company*,[52] wherein the right of the federal government to exercise its dominant servitude for purposes of interstate commerce by controlling the flow of the St. Mary's River was authorized pursuant to an act of Congress dated March 3, 1909.[53]

The determination of the rights of the United States government with respect to the flow of navigable waters was settled in 1956. In an action to determine private rights in hydroelectric power operations affecting the valuation of land at a Savannah River site, the right of navigation argument was closed in favor of the government.[54] The Court reaffirmed its previous stand that Congress alone was responsible for determining the requirements for improving and

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[47] *Id.* at 325-26.

[48] United States v. Chicago M., St. P. & P. R. R., 312 U.S. 592 (1941).

[49] *Id.* at 596-97, *citing* United States v. Cress, 243 U.S. 316 (1917); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); Scranton v. Wheeler, 179 U.S. 141 (1900); Gibson v. United States, 166 U.S. 269 (1897); and Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1866). Damage to land *above* the high-water mark is discussed at text accompanying notes 84-106 *infra*.

[50] Federal Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954).

[51] In the situation at hand, the River and Harbor Act of 1970, Pub. L. 91-611, § 107, 84 Stat. 1818, *amending* 33 U.S.C. § 426 (1970), certainly appears to provide that clear authorization.

[52] 229 U.S. 53 (1913).

[53] Federal Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. at 249-50 (1954).

[54] United States v. Twin City Power Co., 350 U.S. 222 (1956).

protecting navigation to promote commerce between the states and with foreign countries. So long as the navigational interests are protected, the constitutional interests originating in the commerce clause will be served, and the advancement of any other purposes along with that of navigation is irrelevant.[55] The power granted to Congress to regulate commerce, interpreted to include the regulation of navigation, is a right which, as a "dominant servitude" or a "superior navigation easement," is exclusive of all others both public and private which may exist in flowing waters and which (as in this whole series of cases) may be asserted against any rights tending to conflict or compete with the public's interest in unobstructed or unhampered navigability.[56] Since the government may exercise an exclusive right in navigable waters below the high-water mark, all other rights granted by it to the states and by them to private citizens are subordinate to that dominant right and subject to relinquishment as the public's needs in the waterway may require.[57]

The government's position has been challenged in subsequent actions, with the right of the United States to exercise its dominant navigational servitude consistently upheld.[58] It should be recalled, however, that that right has been qualified where the public right conflicts with the exercise of some private right, and the courts have required the showing of a specific congressional authorization for the exercise of the navigational servitude when private rights are affected.

Coast Guard Icebreaking

The "dominant navigational servitude" may conceivably be exercised by any of several agencies of the federal government. The United States Coast Guard is governed mainly by the requirements of Title 14, United States Code. Section 2 of Title 14 delineates a composite picture in broad terms of all the primary duties assigned to the Coast Guard. Included therein is the requirement that the:

> Coast Guard . . . shall develop, establish, maintain, and operate, with due regard to the requirements of national defense, . . . icebreaking facilities . . . for the promotion of safety, under and over the high seas and waters subject to the jurisdiction of the United States . . . .[59]

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[55] *Id.* at 224. In regard to the Great Lakes ice problem, therefore, it is irrelevant what other interests may be served by the premature ice breakup, as long as the primary concern is the improvement of navigation in furtherance of the national interests originating in the commerce clause.

[56] *Id.* at 224-25.

[57] *Id.* at 227-28.

[58] United States v. Rands, 389 U.S. 121 (1967); Pitman v. United States, 457 F.2d 975 (Ct. Cl., 1972).

[59] 14 U.S.C. § 2 (1970), *amending* 14 U.S.C. § 2 (1949).

Pursuant to statutory requirements, the Commandant of the Coast Guard has promulgated instructions establishing the domestic icebreaking policy of the Coast Guard.[60] Two specific purposes are enumerated as justification for the Coast Guard's policy and mission in this respect, *i.e.*, the assistance of waterborne commerce by opening and keeping open shipping lanes along the principal waterways of commerce, and the control or prevention of flooding caused by ice jams.[61]

In conjunction with the Coast Guard's role of providing assistance in aid of commerce, and pursuant to the Rivers and Harbors Act of 1970, the Coast Guard has been working in cooperation with the Corps of Engineers of the United States Army on a:

> program to demonstrate the practicability of extending the navigation season on the Great Lakes and St. Lawrence Seaway, including but not limited to, ship voyages extending beyond the normal navigation season and observation and surveillance of ice conditions and ice forces.[62]

The Coast Guard, without question, has statutory authority to maintain and employ a specialized class of vessels with icebreaking capabilities.[63] To what extent they legally may be employed may be another matter, however. It would certainly seem that Congress was well within its constitutional bounds when it passed the 1970 Rivers and Harbors Act. Therein lies the key to the present dispute. *Federal Power Commission v. Niagara Mohawk Power Corporation*[64] required that a specific congressional authorization be given for the exercise of the navigational servitude if private rights in the navigable waterway were to be affected, citing the St. Mary's River case of *United States v. Chandler-Dunbar Water Power Company*[65] as an example of such appropriate legislation.[66] Moreover, in *United States v. Twin City Power Company*,[67] the Court said emphatically

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[60] Commandant, United States Coast Guard, Domestic Icebreaking Policy, Instruction 3253.1 (April 1, 1970) (Copy on file in Ninth Coast Guard District Legal Office, Fed. Bldg., Cleveland, Oh.) [Hereinafter referred to as Commandant's Instruction]. Domestic as used herein refers to the use of icebreaking facilities in the area of the continental United States as opposed to polar icebreaking which encompasses Arctic and Antarctic operations. As the senior officer of the major agency in the U.S. Department of Transportation, the Commandant issues pertinent instructions for the implementation of departmental policy as it relates to the conduct of Coast Guard missions.

[61] Commandant's Instruction, *supra* note 60.

[62] River and Harbor Act of 1970, Pub. L. No. 91-611, § 107(b), 84 Stat. 1818.

[63] 14 U.S.C. §2 (1970). *See also*, KAPLAN & HUNT, *supra* note 32, at 131-46, particularly 143-44.

[64] 347 U.S. 239 (1954).

[65] 229 U.S. 53 (1913).

[66] Federal Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. 239, 249-50 (1954).

[67] 350 U.S. 222 (1956).

that congressional action in the interest of navigation to promote commerce was its *only* concern, and that whatever else may or may not be benefited thereby was constitutionally irrelevant.[68]

Thus, there is clearly a congressional mandate in the 1970 Rivers and Harbors Act, and also court approval (in cases not considering the 1970 Act) regarding the furtherance of commerce via navigation, both seemingly authorizing the Army Corps of Engineers to proceed, with the assistance of the Coast Guard, to conduct a feasibility study for an extended navigation season.[69] Since the Coast Guard is uniquely endowed with the ability to navigate in otherwise non-navigable waters (because of the ice), it appears that Congress (in its exclusive right to make such a determination) has recognized that ice, or naturally frozen navigable waters, although ordinarily an obstruction to navigation, may not be so under certain circumstances.[70] The Coast Guard, or anyone else for that matter, is perfectly free to navigate through ice. The qualification is, of course, that in order to accomplish such a feat, a vessel must be equipped with icebreaking capabilities such as those presently found on specially outfitted Coast Guard vessels.[71] The limiting factor, therefore, is not legal in nature, but rather physical.[72]

Until all of the lake carriers (which presumably would be engaged in transporting much of the goods and bulk cargo on the Great Lakes during any period of extension into the ice season) could become specially equipped to operate self-sufficiently (as some are capable of doing even now), any policy of domestic icebreaking formulated within the Coast Guard must include a provision for icebreaking resources to be employed during the extended season in ice bound areas.[73] If it is in the best interests of the nation to under-

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[68] *Id.* at 224.

[69] River and Harbor Act of 1970, Pub. L. No. 91-611, § 107, 84 Stat. 1818.

[70] *See* Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855); United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940).

[71] The most obvious special equipment necessary for such operations are a reinforced bow, greater shaft horsepower, heavy-duty propulsion and steering gear (propellers and rudders) with protective shielding where possible to enable maneuvering astern if necessary, and raw water intake heaters to prevent freezing of the engine cooling system. Some privately owned vessels operating on the Great Lakes are even now equipped with reinforced bows and special steering gear for navigation in ice.

[72] Almost any steel-hulled vessel and even some with wooden hulls can navigate through thin sheet ice of up to several inches thickness, but the older and thicker the ice becomes, combined with pressure ridges caused by breaking and refreezing, the harder it is to penetrate. An alternative to independent vessel operation in ice is to use specially equipped icebreakers stategically placed in formation with unequipped vessels in convoy through a frozen ice field. The icebreakers penetrate the ice allowing the standard-hulled vessels to pass through the area with little or no damage. Such procedure is regularly employed by the Coast Guard when rendering assistance to vessels which become icebound. For general information regarding Great Lakes icebreaking operations, procedures, and equipment, refer to JOINT GUIDE, *supra* note 1, at 8-14. *See also* Sherer, *Icebreaking on the Great Lakes,* COAST GUARD ENGINEER'S DIGEST 38 (March, 1974).

[73] *Year-Around Shipping Season on the Great Lakes, supra* note 10.

take such a project on a full-time basis, it will be incumbent upon all agencies involved to perform their specialized tasks in furtherance of the national interests. At the same time, whatever existing private rights which might be adversely affected or lost by such a project must somehow be protected or compensated.

Liability

While there can be no doubt that the island residents have certain rights to use natural ice bridges for travel and transportation, nevertheless, those private rights are subordinate to the public right of navigation, particularly when exercised through the congressional power to regulate commerce through navigation. Thus the issue: where two rights (that of the public to control navigation through its government, and that of private citizens to use and enjoy the waters in their natural condition) compete, and the public right prevails, should there be compensation for the loss of the private rights?

The narrow issue is whether a governmental agency (or any other party so engaged), acting under congressional authorization, should be liable for the consequences of its icebreaking activities in conjunction with that authorization. For example, if unreliable ferry service results, should the agency be liable for costs involved in providing alternative means of transportation? Further, should liability attach for any other losses suffered by the private citizens of the region, such as lost wages and education, unavailability of medical treatment, or damage to property?

There are four interests of immediate importance to consider when answering these questions. One, of course, is that of the federal government which must rely on the exercise of the navigational servitude with explicit authority from Congress as justification for its superior right of navigation in aid of commerce. Another is the general commercial interest which will benefit by the extended shipping season, acting in conjunction with, or independent of, governmental efforts. On the other hand, there are two groups of island residents who have established certain property rights, the taking of which may or may not be compensable under the fifth amendment to the Constitution.[74] One group consists of owners of riparian lands who may contend that the breaking of ice during the extended season will result in the erosion of their beaches or damage to other property (boats, docks, boathouses). That group will be dealt with briefly, but the primary interest here is with the other, the persons

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[74] U.S. CONST. amend. V, as applicable here reads, ". . . nor shall private property be taken for public use without just compensation."

who could conceivably become stranded on their islands as a result of their loss of the traditional use of the ice in its natural state, either for walking across or as a natural bridge (boom) to assist in maintaining an open-water ferry track. The loss of that traditional reliance may amount to a taking of private property for public use which should be compensable under the fifth amendment.[75]

Riparian Owners

With respect to the position of the riparian land owners who might seek to recover for ice-caused damages resulting from the passage of vessels past their property, two types of damage may result. First, as to the damage of any structure or object located in the bed of the waterway *below* the high-water mark no matter how permanently situated, the weight of authority most definitely appears

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[75] At this point, the general practitioner may feel that his talents lie elsewhere. Such attitude need not be the case, however, since the merger of the Admiralty Rules and the Federal Rules of Civil Procedure for United States District Courts. FED. R. CIV. P. 1, 9(h). No longer is there an "admiralty side" of the Federal District Court, and problems involving admiralty jurisdiction need be no more novel to the uninitiated attorney than any other previously unexplored area of the law. Suffice it to say here that since 1845 the admiralty jurisdiction of the Federal District Courts has included the Great Lakes and the navigable waters connecting them. Act of Feb. 26, 1845, ch. 20, 5 Stat. 726. *See* Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851), holding that Act of Congress to be consistent with the Constitution of the United States. *See also* Interlake Steamship Co. v. Nielsen, 338 F.2d 879 (6th Cir. 1964), holding that frozen navigable waters adjacent to a dock on the Great Lakes are clearly subject to admiralty jurisdiction.

The 1920 Suits in Admiralty Act vested exclusive jurisdiction in the district courts for actions against the United States arising out of the operation of merchant vessels or tugs for the federal government. Suits in Admiralty by or against Vessels or Cargoes of the United States, 46 U.S.C. §§ 741 *et seq.* (1920); *see* Matson Navigation Co. v. United States, 284 U.S. 352 (1932), vesting exclusive jurisdiction of all maritime causes of action against the United States arising out of the Suits in Admiralty Act in the district courts. *See also* Andrews & Co. v. United States, 124 F.Supp. 362 (Ct. Cl. 1954), interpreting the Act to include all merchant vessels owned by the United States or operated by or for it. Liability was expanded by the 1925 Public Vessels Act to include damages caused by public vessels belonging to the United States. Public Vessels Act, 46 U.S.C. §§ 781-91 (1925). In 1960, the Suits in Admiralty Act jurisdiction of bring *all* maritime claims against United States vessels into the admiralty jurisdiction of the district courts. Bushey v. United States, 398 F.2d 167 (2d Cir. 1968).

Although the Federal Tort Claims Act has been applied to maritime torts of the United States, more recent cases hold that maritime tort claims should be brought under the Suits in Admiralty Act, not the Federal Tort Claims Act. Federal Tort Claims Act, 28 U.S.C. §§ 2671-80, (1948); Moran v. United States, 102 F.Supp. 275 (D. Conn. 1951). *See also* Tankrederiet Gefion A/S v. United States, 241 F.Supp. 83 (S.D. Mich. 1964). In fact, the United States has been held to have the same duty under sections 1346(b) and 2671 of the Federal Tort Claims Act as under the Suits in Admiralty Act. Beeler v. United States, 256 F.Supp. 771 (W.D. Pa. 1966).

In 1948 Congress passed the Admiralty and Maritime Jurisdiction Act to extend admiralty jurisdiction to any property damage or personal injury caused by any vessel on navigable waters regardless of the fact that the damage or injury may have occurred or been consummated on land. Admiralty and Maritime Jurisdiction Act, 46 U.S.C. § 740 (1948). The Act specifically provided, however, that the Suits in Admiralty or Public Vessels Acts shall constitute the exclusive remedy for actions brought against the United States. More importantly, the Act also provided that no suit against the United States may be filed until six months have elapsed after a written complaint and claim has been presented to the federal agency owning or operating the vessel which allegedly caused the injury or damage.

against recovery.[76] The exercise of the dominant navigational servitude includes everything below the high-water mark.[77] The fact that the riparian owner is geographically situated to build and use such structures exclusive of other nonriparian owners does not protect his legal position with respect to the federal government. Since the exercise of the navigational easement must be congressionally authorized,[78] compensation for damages resulting therefrom, if justified on the grounds of a fifth amendment "taking" for public use, would merely mean that the United States is paying for something it already owns, something already within the inventory of the public domain.[79] Cases denying liability in analogous situations have discussed "incidental consequences in exercise of the right,"[80] "consequential damages as a matter of law,"[81] and "an obligation of a riparian owner to suffer the consequences of an improvement of navigation by the United States in exercise of its dominant right in that regard."[82] This apparently settled doctrine of governmental immunity from consequential damages has been applied (in at least one case involving the Tennessee Valley Authority), regardless of "whether the alleged liability is predicated on nuisance, negligence, or other tortious conduct."[83]

Moreover, since the dominant servitude is restricted to the navigable limits of the waterway as determined by the high-water mark,[84] "it is consistent . . . to deny compensation where the claimant's private title is burdened with this servitude but to award com-

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[76] United States v. Chicago M., St. P. & P. R. R., 312 U.S. 592, 596-97 (1941), *citing* United States v. Cress, 243 U.S. 316 (1917); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); Scranton v. Wheeler, 179 U.S. 141 (1900); Gibson v. United States, 166 U.S. 269 (1897); and Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713 (1866).

[77] United States v. Kansas City Life Ins. Co., 339 U.S. 799, 808 (1950).

[78] Federal Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. 239, 249-50 (1954) (action to determine whether Federal Water Power Act of 1920 abolished private proprietary rights to use waters of navigable stream for power purposes).

[79] United States v. Twin City Power Co., 350 U.S. 222, 228 (1956) (action for condemnation by the United States to determine whether valuation includes value of land as site for hydroelectric power operations on the Savannah River).

[80] South Pacific Co. v. United States, 58 Ct. Cl. 428, 432 (1923), *aff'd*, 266 U.S. 586 (1924).

[81] Franklin v. United States, 101 F.2d 459, 463 (6th Cir.), *aff'd*, 308 U.S. 516 (1939).

[82] W. A. Ross Constr. Co. v. Yearsley, 103 F.2d 589, 592 (8th Cir. 1939), *aff'd*, 309 U.S. 18 (1940).

[83] Atchley v. T.V.A., 69 F.Supp. 952, 954 (N.D. Ala. 1947) (action to recover for lost crops as a result of negligent, wanton, or willful flooding of a T.V.A. reservoir).

[84] The "high-water mark" is properly applicable to tidal waters, and designates the line on the shore reached by the water at the high or flood tide. The high-water mark of a river, not subject to tide, is the line which the river impresses on the soil by covering it for sufficient periods to deprive it of vegetation, and to destroy its value for agriculture. BLACK'S LAW DICTIONARY 1763 (4th ed. Rev. 1968). Since the Great Lakes are only minimally affected by tides, this distinction is more academic than practical.

pensation where his title is not so burdened."[85] Thus, as to the lands *above* the normal high-water mark, there appears to be a divergence of opinion on the obligation to provide compensation for damage to them.

The dividing line between those cases imposing liability and those which do not centers upon the degree of harm and permanence of the damage.[86] Those favoring compensation follow the principle that when the natural conditions of the waterway are drastically altered causing some permanent destruction to the land, the owners would then be entitled to compensation as a fifth amendment "taking" for public purposes.[87] There is some case authority to support a finding that such alterations may include, but are not limited to, the raising of the water above the ordinary high-water mark by construction of locks and dams and other flood control projects.[88] Further, in order for the "taking" to be constitutionally compensable it need not be a complete taking of a person's property but, rather, may only involve "a direct interference with or disturbance of property rights."[89]

On the other hand, cases denying compensation with respect to shore erosion indicate that where there has been no direct or continuous taking of property in the sense that the land is physically entered and taken over for public use, but only incidental or consequential losses are suffered, such damage is not compensable under the fifth amendment unless specifically authorized by statute.[90] Under the fifth amendment, the federal government is obliged to compensate only for that which it takes by direct appropriation; it is not obliged to do more. "It need only pay for what it takes rather than for all that the owner has lost."[91]

A recent case of shore erosion, relying on the fifth amendment right of compensation, involved the Canaveral Harbor Project in Florida.[92] In that case, since Congress authorized a project designed to provide a deepwater harbor in aid of navigation, plaintiff's right

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[85] United States v. Kansas City Life Ins. Co., 339 U.S. 799, 808 (1950).

[86] *See* 2 P. NICHOLS, EMINENT DOMAIN § 5.79 (3d ed. 1970).

[87] Coates v. United States, 93 F.Supp. 637 (Ct. Cl. 1950).

[88] Tennessee Gas Transm'n Co. v. United States, 173 Ct. Cl. 1180, 1181 (1965), *cert. denied*, 383 U.S. 943 (1966).

[89] R. J. Widen Co. v. United States, 357 F.2d 988, 993 (1966). *See also* United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950) (an interference with natural seasonal overflow of the San Joaquin River onto riparian grasslands held compensable).

[90] Franklin v. United States, 101 F.2d 459, 463 (6th Cir.), *aff'd*, 308 U.S. 516 (1939).

[91] R. J. Widen Co. v. United States, 357 F.2d 988, 994 (Ct. Cl. 1966), *citing* Monogahela Navigation Co. v. United States, 148 U.S. 312 (1893). *See also* United States v. Virginia Electric & Power Co., 365 U.S. 624, 633 (1961).

[92] Pitman v. United States, 457 F.2d 975 (Ct. Cl. 1972).

to recover required a showing of "a property right in the uninterrupted and natural flow of the Atlantic Ocean."[93] If that requirement is compared by way of analogy to a showing of a property right in the uninterrupted and natural state of frozen waterways, such as in the present discussion, some interesting conclusions might be drawn.

In the Canaveral Harbor Project situation, the court found that the plaintiff was unable to show a permanent inundation of his land above the high-water mark by an increase in the level of the Atlantic Ocean. It could not be proven, the court said, that the action of the government directly caused the reaction from which plaintiff sought relief. No entry had been made onto his land by project employees which could be considered a direct invasion or appropriation rather than consequential damages, for which compensation would not be granted. Even if the erosion had been reasonably foreseeable, such contention had been rejected in previous cases by the courts.[94] Finally, even if lands above the high-water mark ("fast lands") were eroded, which was neither proven by plaintiff nor admitted by the government, *United States v. Twin City Power Company*[95] already held that such loss is non-compensable, and plaintiff was not entitled to recover.[96]

If those considerations are applied to the problem under discussion, the result should be the same. In the present situation there has been no permanent inundation of the land, but, if anything, only a relatively slight and occasional displacement of the ice along the water's edge. There certainly has been no direct entry upon the land by any personnel involved with the extended season project except with express permission of the land owner in order to obtain ice, weather, and other scientific data.[97] No allegation of reasonable foreseeability has been offered, nor would such contention necessarily sustain a right to compensation.[98] Finally, the *Twin City* case, coupled

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[93] *Id.* at 976.

[94] W. A. Ross Constr. Co. v. Yearsley, 103 F.2d 589 (8th Cir. 1939), *aff'd*, 309 U.S. 18 (1940); Franklin v. United States, 101 F.2d 459 (6th Cir.), *aff'd*, 308 U.S. 516 (1939).

[95] 350 U.S. 222 (1956).

[96] Pitman v. United States, 457 F.2d 975, 977-78 (Ct. Cl. 1972).

[97] Some of the activities being conducted include: ground surveillance of ice conditions, ice movements, and effects on water levels and shore properties; time lapse photography in the St. Mary's, St. Clair, and Niagara Rivers to document ice movements and ship passages; short term ice development forecast techniques continuing for the Great Lakes; study of the effects of vessel passages on selected shore structures and shorelines by use of monitors; measurement of water flow, velocity, direction, levels, and temperatures, as well as ice thickness; field studies to determine results of ice forces on shore structures; and assessments by the Environmental Protection Agency and others of adverse or beneficial environmental impacts observed from monitoring programs. *A Waterway For All Seasons*, COAST GUARD ENGINEER'S DIGEST 21, 24-25 (March, 1974).

[98] See Authorities cited *supra* note 91.

with its strong application in 1972 by the Court of Claims in the *Pitman* case, seems to preclude, at least for the present time, any right of recovery for incidental or consequential erosion of uplands where no direct or permanent invasion of the owner's fast lands accompanies the damage.[99] Since the United States Court of Claims failed to find a private property right in the uninterrupted and natural flow of the Atlantic Ocean,[100] it follows that no similar right exists in the uninterrupted and natural state of the frozen waterways of the Great Lakes.

In one of the rare suits filed for damages caused by the maneuvering of a vessel in an ice field, the "average reasonable man" standard of due care as exercised by the "prudent seaman" was used to determine liability.[101] Reasonable care must be employed when operating a vessel so as not to willfully inflict damage to shore structures, although some degree of risk must be assumed by the owners of such installations due to their location in or near navigable waters.[102] "Negligence at sea," the court reasoned, "does not differ, in principle, from negligence ashore."[103] Statutory fault was imposed because a lookout was not properly posted as required by the Rules of the Nautical Road.[104] Applying the standard of the prudent seaman operating his vessel with reasonable care in compliance with applicable statutory requirements for navigation on the Great Lakes, it appears likely that an action filed to recover damages as a result of such navigation through an ice field, absent a showing of negligence, would meet with little success.[105] As long as reasonable precautions are taken in ice breaking operations to avoid inflicting what might be considered "willful" or "negligent" damage to shore installations, it appears that liability would not be imposed for incidental or consequential damages resulting from such operations.[106]

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[99] Pitman v. United States, 457 F.2d 975 (Ct. Cl. 1972).

[100] *Id.*

[101] R. & H. Development Co. v. Diesel Tanker, J. A. Martin, Inc., 203 A.2d 766, 771 (2d Conn. Cir. Ct. 1964); *see* G. GILMORE & C. BLACK, JR., THE LAW OF ADMIRALTY 420 (1957).

[102] R. &. H. Development Co. v. Diesel Tanker, J. A. Martin, Inc., 203 A.2d 766, 770-71 (2d Conn. Cir. Ct. 1964).

[103] *Id.* at 771.

[104] ". . . The Rules are not a complete and comprehensive code of navigation, compliance with which is sufficient to avoid liability, but that, on the contrary, the ordinary precautions of good seamanship, as defined by custom and case law, are still required. 'Negligence' in general, as well as non-compliance with the Rules, is a ground of liability." G. GILMORE & C. BLACK, JR., *supra* note 97, at 420 (1957). *Compare* this rule *with* the "Pennsylvania Rule," The Pennsylvania, 86 U.S. 125 (1873).

[105] And *see* Atchley v. T.V.A., 69 F.Supp. 952 (N.D. Ala. 1947), in support of the argument that even negligence may not result in liability under some circumstances.

[106] R. & H. Development Co. v. Diesel Tanker, J. A. Martin, Inc., 203 A.2d 766, 770 (2d Conn. Cir. Ct. 1964), *citing* People's Ice Co. v. The Excelsior, 44 Mich. 229, 234, 6 N.W. 636, 639 (1880).

Loss of Transit

But what of the private property rights of the greater number of islanders, the non-riparian owners? Have not interests of a totally different nature from those of the riparian owners been affected by an extended navigation season? Could those citizens not assert a property right in the continued use of traditional ice bridges? Is the use and enjoyment of the natural condition of an area which has provided a traditional ice bridge for travel over the water to the mainland, or has served as a natural ice boom to prevent obstruction of the open-water ferry track, a right which may be classified as a private property right for which compensation must be made if taken for public use such as the improvement of navigation? An 1893 case, *Monongahela Navigation Company v. United States*,[107] provides a starting point by relating the "improvement of navigation" provisions of the congressional power to regulate commerce to the compensation requirement for the taking of private property under the fifth amendment. Although Congress has ultimate control and regulation of navigation and commerce, if private property is taken in exercise of that control, then just compensation must be paid.[108] Since the taking of private property must be compensated, it is necessary to determine what rights, if any, in the use or enjoyment of the navigable waterway, whether flowing or frozen, fall within the scope of compensable private property.

In *Gibson v. United States*[109] and *Scranton v. Wheeler*,[110] decided near the turn of the century, the Supreme Court held that a riparian owner's access to public navigable waters may be impaired or even destroyed by improvements of navigation authorized by Congress. Loss of access was merely a consequence which must be borne by the owner of riparian lands in order that navigation might be improved.[111] Requiring compensation for such incidental results would tend to have a crippling effect on Congress' attempts to improve navigation in promotion of commerce.[112] The right of access was held not a compensable private property right under the fifth amendment requirement.[113] The same result would seemingly apply to the rights of non-riparian owners with respect to access to public navigable waters.

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[107] 148 U.S. 312 (1893).

[108] *Id.* at 336.

[109] 166 U.S. 269 (1897).

[110] 179 U.S. 141 (1900).

[111] Gibson v. United States, 166 U.S. 269, 276 (1897); *see* 2 NICHOLS, *supra* note 83, §5.792.

[112] Scranton v. Wheeler, 179 U.S. 141, 164-65 (1900).

[113] *Id.* at 165.

A 1964 Ohio case arrived at a similar result dealing with the question of the rights of a riparian owner with access to the navigable part of a stream which had been cut off by the authorized construction of a bridge across the stream.[114] Ownership of land on a public navigable stream, although giving the owner more of an opportunity to enjoy an access to the water, nevertheless does not give him any greater right to its use for navigation than any other member of the public has. He, therefore, has no constitutional right to compensation for loss of access to navigable waters.[115]

The right to insist on the retention of the status quo was rejected by the Supreme Court in 1913 when it stated that "an individual owner has no right to insist that *primitive conditions* be suffered to remain and thus all progress and development be rendered impossible."[116] The Court reaffirmed its view that the United States would not be liable for remote or consequential damages resulting from appropriate attempts undertaken to benefit navigation.[117]

Between 1913 and 1956 the Supreme Court considered a series of four extremely important cases culminating in *United States v. Twin City Power Company*[118] regarding the question of the existence of private property rights in the hydroelectric power capacity of public navigable waters.[119] In those cases, the Court developed the theme that since the public right of navigation exercised by the federal government's dominant servitude is paramount, compensation for any private rights claimed in the flow of navigable waters over which the government already had dominion would result in the government paying for something it already owned.[120] The right to appropriate the current for commercial use belongs not to a riparian owner, except with respect to other riparian owners, but rather in the Congress.[121] Private claims in the public domain would be *created* if the United States was required to pay for the hydroelectric power value of a navigable waterway lost as a result of improvements in aid of navigation.[122] The effect on the rights of an individual or

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[114] State *ex rel.* Andersons v. Masheter, 1 Ohio St. 2d 11, 203 N.E.2d 325 (1964).

[115] *Id.*

[116] Jackson v. United States, 230 U.S. 1, 20 (1913); and *see* definition, *supra* note 45.

[117] Jackson v. United States, 230 U.S. 1, 23 (1913), *citing* United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913).

[118] 350 U.S. 222 (1956).

[119] Federal Power Comm'n v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954); United States v. Willow River Power Co., 324 U.S. 499 (1945); and United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913).

[120] *Id.*

[121] United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 76 (1913).

[122] United States v. Twin City Power Co., 350 U.S. 222, 228 (1956).

group made by the exercise of the dominant navigational servitude was succinctly described in *United States v. Willow River Power Company:*[123]

> Rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them. Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation. Where these interests conflict they are not to be reconciled as between equals, but the private interest must give way to superior right, or perhaps it would be more accurate to say that as against the Government such private interest is not a right at all.[124]

A more recent subject of judicial treatment with respect to a taking of private rights in the use of a waterway has been the consideration of the right to be compensated for the value of land based on its potential use as a port site.[125] No distinction could be made, however, between value as a power site or as a port site, and since the Supreme Court had already held that there was no constitutional duty to compensate in the power cases, no obligation could be found to compensate for lost port value.[126]

United States v. 8,968.06 Acres of Land[127] treated the problem of determining the right to compensation for various land uses by asking whether that use is "one which the United States, in the exercise of its dominant navigational servitude, has the power to prohibit or destroy without incurring the constitutional duty to compensate."[128] Applying that guideline to the situation on the Great Lakes gives rise to the question toward which this paper is directed: whether the United States government, in the exercise of its authority to promote commerce by extending the normal navigation season, has the power or right to destroy or substantially impair, without liability for compensation in any form, the right of the islanders and others similarly situated not to be stranded during the winter months of the extended navigation season.

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[123] 324 U.S. 499 (1945).

[124] *Id.* at 510.

[125] United States v. Rands, 389 U.S. 121 (1967); United States v. 8,968.06 Acres of Land, 318 F.Supp. 698 (S.D. Tex. 1970).

[126] United States v. Rands, 389 U.S. 121, 124-25 (1967).

[127] 318 F.Supp. 698 (S.D. Tex. 1970).

[128] *Id.* at 703.

Conclusion

As harsh as it may sound, the federal government may, with judicial impunity, exercise its dominant navigational servitude to improve navigation on the Great Lakes by breaking the ice formed in the restricted connecting waters between the Lakes, and consequently may thereby strand the island inhabitants who have traditionally relied on the unbroken ice for travel or transportation.

> If damages from any other cause than a taking of private property for public use are to be absorbed by the public, they must be assumed by act of Congress and may not be awarded by the courts merely by implication from the Constitutional provisions.[129]

Congress has authorized the Coast Guard to break ice. It has directed that a study be made of extended navigation into the winter months on the Great Lakes, utilizing Coast Guard icebreaking assistance. Ice has been broken, people have been stranded (conceivably for long periods of time), and the judiciary has determined in prior cases involving analogous facts that a property right may not be asserted against the federal government in the private reliance on the natural condition of a public navigable waterway. The remedy for the loss of such right may be found only in the Congress, according to the courts, absent a direct and permanent "taking" of the riparian fast lands for public use.

As early as May 13, 1971, one such congressional appeal was made. The proposition was put forth by one Great Lakes Congressman: ". . . if the public expenditure for year-round shipping is justifiable, then so also is the expenditure to provide safe, adequate, year-round transportation to these inhabited islands."[130]

The solution is relatively simple. Transportation or travel between two points can only be accomplished by land, sea, or air. Many reasonable, realistic, and economically feasible alternatives have been proposed elsewhere to solve this transportation problem.[131] The fed-

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[129] United States v. Willow River Power Co., 324 U.S. 499, 502 (1945).

[130] *Year-Around Shipping Season on the Great Lakes, supra* note 10, at 14946.

[131] As suggested before, alternative means of crossing the various waters when premature breakup is experienced have been considered. Included in the list have been a permanent bridge; a seasonal pontoon-type bridge; use of helicopter "ferry" service; use of air cushion vehicles which can traverse land, ice, or water; air-bubbler systems to reduce ice jamming at ferry landings; government modification of privately owned ferry vessels to enable them to operate in ice; and even use of government vessels to transport private citizens when necessary. *A Waterway For All Seasons, supra* note 97, at 26.

The Lake Shipping Division of the United States Steel Corporation, a commercial beneficiary of the extended navigation season, has:

> . . . proposed to the Army Corps of Engineers that an ice structure be established above the Little Rapids Cut in the St. Mary's River as a test installation to determine if ice structures won't be the answer to allowing co-habitation of commercial traffic and the proper safe transit of the islanders.

Letter from W. R. Ransom to R. T. Keenen, *supra* note 4.

eral government, although not legally obliged to do so, must certainly consider the human factors involved. If Congress can authorize the expenditure of federal resources to promote private commercial shipping interests, certainly there would seem to be ample justification for a like expenditure, legally required or not, to promote public transportation interests.

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